digital programming is constitutional and fully consonant with the 1992 Cable Act and the *Turner* opinions.

I. THE NCTA PAPER IS PREMISED ON FACTUAL ERRORS

The legal analysis in the NCTA Paper rests on a misunderstanding of the facts, misstatements of the legal positions of Public Television and others, and, in at least one instance, a misreading of *Turner I*. Specifically:

Assertion: "[I]f a digital broadcaster carved *six* 1 MHz programming channels out of its 6 MHz of licensed spectrum, a broad view of 'primary video' would require a cable operator to carry each of these separate program streams. Thus, the constitutional burden on the cable operator would be multiplied."[3]

Fact: The limiting factor for a cable operator is bandwidth, not channels. Digital compression technology is such that a broadcaster's digital programming stream occupies only 3 MHz of cable bandwidth, half the bandwidth necessary for carriage of the broadcaster's analog channel.[4] The bandwidth required to transmit digital versus analog signals is thus cut in half, and this is so whether the broadcaster's programming stream consists of a single channel of high definition video or up to six channels of standard definition video. Because six standard definition programming streams occupy the same 3 MHz of bandwidth needed to carry a broadcaster's single high definition stream, in each case the number of "channels" that the cable operator has available for other programming is the same.

Assertion: "Some have argued for an expansive interpretation of 'primary video' on the ground that there might be surplus cable channel capacity at the end of the digital transition."[5]

Fact: Public Television and other advocates of a broader interpretation of "primary video" have argued that such an interpretation is faithful to the intent of Congress and essential to ensure the survival of *free,* over-the-air television.

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[3] NCTA Paper at 3

[4] *See* S. Merrill Weiss & Scan D. Driscoll. Analysis of Cable Operator Responses to FCC Survey of Cable MSOs 12 (Aug. 14, 2001), submitted as Appendix A *to* the Reply Comments of NAB/MSTV/ALTV in CS Docket No. 98-120 (Aug 16,2001) ("NAB Capacity Study") ("Digital broadcast signals . . . use spectrum more efficiently and require less spectrum on a cable system than do analog signals. . . . [T]he 19.3 Mbps of a digital broadcast signal occupies the entirety of a 6 MHz channel for broadcasr transmission. When that same signal is carried on a cable system, however. it occupies . . . half the capacity of a 6 MHz channel if 256-QAM modulation is used.").

[5] NCTA Paper at 6.

These arguments do not depend on whether cable operators will have surplus channel capacity.

Assertion: "Others have argued for an expansive interpretation of 'primary video' on the ground that broadcasters already occupy *6* MHz of frequency on cable systems as a result of the analog must cany rules. But this state of affairs is constitutionally irrelevant. The return (as part of the digital transition) of the 6 MHz currently occupied by analog must carry signals does not entitle broadcasters to a *new* 6MHz of must cany spectrum for multicasting purposes."[6]

Eact: As noted above, Public Television and others have advocated an interpretation of "primary video" that includes multicast programming because such an interpretation is grounded in the language of the Communications Act and advances the fundamental legislative goal of preserving free, over-the-air television. Public Television has not argued that broadcasters are "entitled" to *6* MHz on the digital tier as a result of the analog must carry rules. It is nevertheless true – and constitutionally relevant – that the burden on cable operators of carrying all ofbroadcasters' free, over-the-air digital programming will bc lcss than the burden upheld by the ***Turner*** court.

Assertion: "[I]n ***Turner I***, four Justices recognized that a common carriage obligation for 'some' of a cable system's channels would raise substantial Takings Clause questions."

Eact: Not a single Justice in ***Turner I*** said any such thing. In the passage cited by the NCTA Paper, four Justices merely alluded in passing to a "possible" takings issue, without identifying the issue as "substantial": "Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another."'

[6] *Id* at 6-7.

Turner I, 512 U.S. at 684.

II. THE NCTA'S FIRST AMENDMENT ARGUMENT IS LEGALLY AND FACTUALLY FLAWED

A. The Supreme Court's *Turner* Opinions Support The Constitutionality Of Requiring Cable Operators To Carry Broadcasters' Multiplexed Programming.

In *Turner*, the Supreme Court upheld the constitutionality of the analog must carry rules. The Court held that the must carry rules are content neutral and therefore not subject to strict scrutiny.' Applying intermediate scrutiny, the Court held that the must carry rules further important governmental interests that are unrelated to the suppression of free expression, and that the rules *are* narrowly tailored to further those interests.[9] The Court found that the rules serve a trio of important government interests: "'(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.'"[10] The Court further determined that "the burden imposed by must carry is congruent to the benefits it affords," leading it to uphold the constitutionality of the rules."

The analysis in *Turner* makes clear that interpreting "primary video" as including multicast programming streams raises no serious First Amendment issue. Such an interpretation would lead to content-neutral must carry rules subject only to intermediate scrutiny. Moreover, each of the important governmental interests recognized in *Turner* is present in the digital context, and the Commission can readily craft a multicast carriage obligation that is narrowly tailored to further those interests.

1. A multicast carriage requirement preserves the benefits of free, over-the-air television.

As the Court recognized in *Turner*, "the importance of local broadcasting outlets 'can scarcely bc cxaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"'* The Court also recognized that "'broadcast stations denied [cable] carriage will either deteriorate to a substantial degree or fail altogether"'" because they will lose the almost two-thirds of their potential audience that subscribes to cable.[14] The same is true in the digital environment: multicast digital programming

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[8] *Id.* at 661

[9] *Id.* at 662.

[10] *Turner II*, 520 U.S. at 189 (quoting *Turner I*, 512 U.S. at 662).

[11] *Id.* at 215-16.

[12] *Turner I*, 512 U.S. at 663 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[13] *Turner II*, 520 U.S. at 192 (quoting *Turner I*, 512 U.S. at 666).

[14] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 18 (2002) ("Eighth Annual Report").

streams that are denied cable camage will either deteriorate to a substantial degree **or** fail altogether, making them unavailable both to cable households and to the substantial percentage of American households that do not have access to cable.[15] **A** lack of must carry **rights** would be particularly devastating for public television stations, because those stations generally have limited financial resources, face special difficulty in obtaining cable carriage,'' and rely upon widespread distribution to secure the underwriting support and viewer contributions that are essential to their operation.

Multicasting creates the possibility of an entirely new television experience for viewers, and Public Television is already taking steps *to* realize its potential. The *76* public stations now broadcasting in digital plan to use DTV technology to deliver a variety of new and exciting noncommercial educational services to the American public. These stations will use their digital allotments to bring high definition programming to the American public during prime time while broadcasting multiple standard definition channels during the day. This daytime multicasting will address community needs by providing, for example, a 24-hour kids channel, an educational channel devoted to instructional programming and adult education, and a channel focused on local legislative and public interest issues. Other planned multicast channels include multicultural, foreign language, local arts and culture, early childhood development, K-**I2** instructional, college telecourses, "how to" and ''golden years" (aimed at seniors) channels. Stations should not be forced to determine which of these important services is "primary."

Public television has proposed a variety of digital initiatives, including allocating 4.5 megabits per second of digital capacity for transmitting formal educational services to our nation's schools and allocating a portion ofdigital capacity to provide local, regional and potentially national homeland security public safety communications networks. Public television can substantially expand its public service by addressing diverse educational needs of diverse audiences simultaneously. However, Public Television's promising and innovative plans will never get off the ground unless the entirety of its stations' programming streams are carried on cable systems, because broadcasters will be unable or unwilling to invest in services that do not reach the vast majority of their viewers.

The **NCTA** Paper's only response to these arguments is a laconic observation that "the existing must carry rules will continue to ensure that cable operators carry the same broadcast channels that havc historically been available to over-the-air viewers" and that "[s]uch continued carriage -- one channel per broadcaster – would seem fully **to** satisfy the governmental interest in preserving the benefits of free broadcast television that traditionally have been

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[15] *Id.* at ¶ 6 n.6. The Report **states that its numbers double-counted single households that subscribe to more** than one *MVPD* (e.g., **a household subscribing** to **borh cable** and **DBS was** counted twice), **so there may** be **as** many as **an additional 2** million households receiving programming solely **over the air.** ***See id.***

[16] ***See.*** *e.g.*, ***Turner II*, 520** U S **at 204 (citing data showing that 36 percent** of noncommercial **stations were not carried** in **the absence** of must **carry obligations);** H. Rep. **No. 102-628, at 70 (1992).**

available to over-the-air viewers."[17] This is no more than an unsupported assertion. It is not supported by *Turner*, which upheld a carriage requirement at a time when one channel was all that broadcasters were capable of transmitting. What viewers historically have been able to view on cable – and what the *Turner* cases upheld as essential to preserving the availability of free local broadcast television – is video programming that could be viewed for free over the air using an antenna.[18] Technology has evolved in the digital context to allow broadcasters to transmit more than one free, over-the-air programming stream, but *Turner's* analysis remains the same and is just as compelling: without cable carriage, the survival of free, over-the-air television is jeopardized. NCTA's position is that the same broadcast station whose survival *Turner* found would be endangered by loss of viewers of its entire programming schedule will remain competitively successful if it loses viewers of as much as 80% of its programming schedule because those viewers do not receive the broadcaster's multiplexed programming. This assertion is not supported by *Turner* and is clearly not the case.

The NCTA Paper makes the unsupported and counterintuitive assertion that there is "no apparent reason to believe (as some have suggested) that requiring carriage of broadcasters' multicast programming will speed the transition to digital TV."[19] In the first place, as the Congressional Budget Office has noted, "[a] strong must carry requirement for cable systems to carry DTV signals – a digital version of the analog rules – will be necessary to achieve the mandated market penetration level by 2006 and end the transition."[20] Since nearly two-thirds of television homes are served by cable, it is obvious that cable must provide broadcasters' digital signals if the transition is to succeed. In addition, cable operators should carry broadcasters' digital programming in whatever free television format best exploits its remarkable capabilities for the benefit of the public. For Public Television, this is likely to mean HDTV in prime time and multicasting in other dayparts. Cable operators' deleting multicast program offerings in those other dayparts would be just as inimical to the transition as downgrading Public Television's prime time HDTV programming to a degraded service level. The principle is the same. Because compelling multicast streams will attract more viewers to the

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[17] NCTA Paper at 8

[18] As Public Television has explained in other pleadings filed in this docket, a broadcaster's "primary video" is its entire package of free, over-the-air digital programming. Its primary video is to be distinguished from its "secondary video," which would reasonably include in the digital context non-broadcast ancillary and supplementary video, audio, and data services. which need not be carried by cable system. See, *e.g.*, Lencr From Marilyn Mohrman-Gillis, Vice President, Policy and Legal Affairs, APTS. to Marlene H. Dortch, Secretary, FCC. in CS Docket No. 98-120 (May 9.2002); Joint Petition for Reconsideration of Public Television in CS Docket Nos. 98-120, 00-96 & 00-2,at 6-10 (Apr. 25,2001).

[19] NCTA Paper at 11

[20] Congressional Budget Office, Completing the Transition to Digital Television, *Summary* at 4 (1999). Retransmitting the content that noncommercial stations will offer to the significant number of Americans that subscribe to cable will reprcscnl a giant step towards reaching the 85 percent penetration threshold required by the Communications Act and will thus advance the transition.

digital medium, which will spill over to other aspects of the transition. a multicast carriage requirement will speed the transition to digital television.

2. A multicast carriage requirement promotes the widespread dissemination of information from a multiplicity of sources.

Carriage of multiplexed programming unquestionably serves the governmental interest in preserving a multiplicity of information sources for viewers of free, over-the-air programming. A multicast carriage requirement will enhance source diversity by ensuring the survival of broadcast stations that decide that multicasting is the highest and best use of their spectrum. Multicasting will allow broadcasters to offer significant amounts of local programming geared to particular audiences. Public stations will use multicasting to meet additional needs of their viewers by offering a variety of different program services that address, for example, pre-school children, K-12 students, college students, older Americans, and/or minority or multicultural communities simultaneously. By multicasting programming streams that do not duplicate the analog signal, stations can provide substantially different services to their viewers, enhancing their popularity and thereby ensuring their survival. Such a result coincides precisely with the interests the Court found to be constitutionally worthy of protection in *Turner*.[21]

3. A multicast carriage requirement promotes fair competition in the market for television programming.

The *Turner* cases also found that promoting fair competition in the market for television programming is an important governmental interest." The Court found convincing evidence that cable dominated the MVPD marketplace,[23] that cable operators have the incentive and ability to drop local broadcast stations from their systems to avoid competition for audiences and advertising dollars,[24] and that vertical integration in the cable industry was increasing.[25] It

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[21] As the Court found in *Turner,* survival of free, over-the-air television *is* necessary to preserve the existence of multiple sources. *See Turner II, 520* U.S. at 190.

[22] *See Turner I*, 512 U.S. at 663; *Turner II*, *520* U.S. at 189-90.

[23] *See Turner II*, *520* U.S. at 197 (finding support for Congress's "conclusion that cable operators had considerable and growing market power over local video programming markets").

[24] *See id* at 200 (citing evidence "ihai cable system would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advemsers").

[25] *See id.* at 198 (stating that "[v]ertical integration in the industry also was increasing and citing "extensive testimony . . . that cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers").

also found that noncommercial stations in particular were likely not to be carried by cable systems without a must carry requirement.[26]

The Court's reasoning remains compelling today. Despite recent growth among other multichannel video service providers, cable remains a bottleneck facility.[27] Cable operators are still in a position to deny broadcasters access to the vast majority of their potential viewers. They still have an economic incentive to do so because they continue to compete with broadcasters for viewers and for advertising revenue and because they have substantial amounts of vertically integrated programming.[28] Moreover, cable operators have made clear through submissions such as the NCTA Paper that absent a mandatory carriage requirement they will not offer all broadcasters' multiplexed programming.[29] Because broadcasters do not have a fair shot at getting their valuable multicast programming carried absent a must carry requirement, such a requirement is essential to enhancing fair competition in the market for video programming.

4. A multicast carriage requirement is narrowly tailored to preserve robust and diverse free over-the-air television

As in *Turner*, the burden imposed by a digital must carry requirement that includes multicast carriage would be congruent to the benefit such a requirement would afford. By contrast, requiring carriage of a single broadcast program would not achieve the important government interests identified in *Turner*. Moreover, a multicasting requirement would impose a relatively modest burden on cable operators, far less than the NCTA Paper suggests.

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[21] *See id.* at 204 (finding that absent a must carry rcquirement, between 19 and 31 percent of all local broadcast stations but 36 percent of noncommercial stations were not carried by the typical cable system).

[27] *See In re Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition,* Report and Order, FCC 02-176, ¶ 4 (2002) ("Cable operators today continue to dominate the MVPD marketplace and that horizontal consolidation and clustering combined with affiliation with regional programming, have contributed to cable's overall market dominance."); Eighth Annual Report ¶ 5 ("Cable television is the dominant technology for the delivery of video programming to consumers in the MVPD marketplace.").

[28] See. *e.g.*, Eighth Annual Report ¶ 157 (stating that 35 percent of national cable programming networks are vertically integrated); *id.* at 158 (explaining that four of the top seven cable MSOs hold ownership interests in satellite-delivered national cahle programming networks and that one or more of these companies has an interest in 52 of the 104 vertically integrated national satellite-delivered cable programming networks).

[29] See. *e.g.*, NCTA Paper; Letter From Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association. to William Caton, Acting Secretary, FCC, in CS Docket No. 98-120 (Apr. 9, 2002); Opposition of NCTA to Petitions for Reconsideration in CS Docket Nos. 98-120, 00-96 & 00-2, at 8-13 (May 25,2001); Time Warner Cable's Opposition to Petitions for Rcconsidnation in CS Docket Nos. 98-120, 00-96 & 00-2, at 11-16 (May 25, 2001).

The "narrow tailoring" requirement allows considerable leeway to the government. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[30] A digital must carry requirement that extends to multicasting would satisfy this flexible standard. Indeed, the NCTA has not even suggested any other less restrictive alternatives, nor does it dispute that cable operators will refuse to carry many broadcasters' multiplexed programming streams absent a must carry requirement.

B. The **NCTA** Fails To Take Account **Of** The Increased Capacity Created **By** Digital Compression **Techoiques.**

The NCTA Paper contends that reading "primary video" to require carriage of multicast programming would greatly increase the burden on cable operators by forcing them to assign as many as six cable programming channels to each local broadcast station.[31] Yet the NCTA Paper does not take issue with the FCC's requirement that a cable operator pass through a broadcaster's HDTV programming in HDTV format.[32] Because carriage of a broadcaster's multiplexed programming requires no more bandwidth than is used to cany its HDTV programming, the NCTA Paper's argument that it would be severely burdened by a multicast carriage requirement is specious.

The factor limiting a cable operator's capacity is not channels but bandwidth. A broadcaster's entire digital programming stream occupies 3 MHz of bandwidth, whether that programming stream consists of a single channel of high definition video or up to six channels of standard definition video.'' Thus, whether a cable operator places a single high definition broadcast stream on onc channel or various standard definition broadcast streams on multiple channels, the number of channels that the cable operator has available for other programming is the same. If the NCTA does not object to carriage of digital broadcast programming in a high definition format that occupies 3 MHz ofbandwidth, it has little reason to complain about carriage of multiplexed programming that occupies the same amount of capacity on the cable system. At most, the issue is whether a cable operator could block all but one stream of standard definition video when a broadcast station is not transmitting high definition programming and statistically multiplex the bandwidth occupied by the remaining standard definition channels.

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[30] *Turner II*, *520* U.S. at 218 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989))

[31] *See* NCTA Paper at 3

[32] *See In re Carriage of Digital Television Broadcast Signals: Amendments to Parr 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999. Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicared Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals.* First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598,2629 (2001) (*"DTV Order"*).

[33] *See supra* note 4

Even if such a practice were technically and economically feasible, requiring carriage of multicast streams would at most amount to a modest burden on cable operators and would plainly be constitutional under ***Turner.***

In addition to not increasing the absolute burden on cable operators, a multicast carriage requirement would impose on operators a burden that, in relative terms, is significantly less than the burden approved by the Court in ***Turner.*** In ***Turner II***, the Court determined that the roughly one-third capacity cap in the statute was sufficient to protect cable operators from being overly burdened by an analog must carry requirement.[34] That cap will be triggered much less frequently, if at all, in the digital context due to the enormous increases in cable system capacity arising from the fact that a broadcaster's entire digital stream occupies only 3 MHz, rather than 6 MHz, of cable bandwidth.[35]

C. Congress Has Recognized The Need For A Digital **Must** Carry Requirement, And The Commission Has Authority **To Define The** Boundaries **Of** That Requirement.

The NCTA Paper asserts that "the Cable Act does not contain any congressional findings with respect to digital must carry, let alone multicast digital broadcast," and argues that the absence of such findings weighs against the constitutionality of a must carry requirement **for** multiplexed programming.[36] In fact, key congressional findings in the 1992 Cable Act apply to digital as well as analog television:

- "Broadcast television programming is . . . otherwise free to those who own television sets and do not require cable retransmission to receive broadcast signals. There is a substantial government interest in promoting the continued

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[34] *See* ***Turner II***, 520 U.S. at 216. In fact, the cap upheld in ***Turner II*** could in effect have been more that one-thud. The one-third cap in the 1992 Cable Act applies lo carriage of local commercial broadcast stations. ***See*** 47 U.S.C. § 534(b)(1)(B). Cable operators are also required lo carry at least three local noncommercial broadcast stations, plus additional nonduplicating local noncommercial broadcast stations. See 47 U.S.C. § 535(e).

[35] In a different context, recent studies have shown that even a dual carriage requirement in the very largest television markets (which have a larger number of local broadcast stations) during the digital transition would fall well below the 33 percent threshold, occupying just 8.43 percent of a cable system's capacity by the end of 2003 and 2.63 percent by the end of the transition. See NAB Capacity Study at 25; see *also* Joseph H. Weber, Cable TV Capacity 15 (June 7, 2001). submitled as an attachment to the Joint Reply to Oppositions to Petitions for Reconsideration of Public Television in CS Docket Nos. 98-120, 00-96 & 00-2 (June 7, 2001) (estimating that at most 12 6 MHz channels are needed to carry all the local digital broadcast signals in the largest markets).

[36] NCTA Paper at 8

availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."[37]

- "A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attracting additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, [or] refuse to cany new signals. . . . There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted . . . or not carried."[38]

- "Consumers who subscribe to cable television often do *so* to obtain local broadcast signals which they otherwise would not be able *to* receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector services to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services."[39]

Each of these findings speaks as much to digital as to analog cable retransmission: (1) there is a substantial government interest in ensuring that consumers can receive via cable the services they can get over the air; (2) cable operators have the incentive and the ability not to carry such services absent a must carry requirement; and (3) cable subscribers are unable or unwilling to switch between programming available on cable and what they can receive over the air.

Moreover, Section 614(b)(4)(B) of the 1992 Cable Act requires the FCC to adapt its must carry rules to accommodate the DTV transition and thus confirms, through express statutory language, that Congress's interest in preserving free, over-the-air television is not limited to analog service.[40] Congress directed the Commission to act promptly once it adopted

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[37] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(12) (1992) ("1992 Cable Act").

[38] *Id.* § 2(15).

[39] *Id.* § 2(17)

[40] *See* 47 U.S.C. § 534(b)(4)(B) ("At such time as the Commission prescribes modifications of the standards for television broadcast signals, [it] shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television system necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards."). The Commission correctly determined in the *DTV Order* that this provision applies to both commercial and noncommercial stations. *See DTV Order*, 16 FCC Rcd at 2608.

the DTV standard to initiate a rulemaking on digital carriage requirements.[41] By instructing the Commission promptly to develop digital must carry rules, Congress confirmed that its findings in the Act apply to digital as well as analog television.

The relevant statutory provisions thus provide a firm foundation for the Commission to articulate and develop regulations based upon the full range of government interests underlying the Cable Act. Indeed, the Commission has been involved in efforts to transition the nation's broadcast television system to an advanced (ultimately digital) system since at least 1987,[42] and since that time has played a role in virtually all aspects of the transition. The Commission has long understood the importance of cable carriage to the survival of broadcast television and is therefore uniquely qualified to determine the extent to which cable carriage of digital broadcast signals is essential to the success of the digital transition.

The Commission's authority to make findings and to develop a record in must carry proceedings is well established. In *Turner,* the Supreme Court recognized that the judicial deference owed to Congress is quite similar to that owed to the Commission; the only difference is one of degree.'' Courts have long recognized the Commission's broad authority to identify and define government interests, particularly when making policy concerning emerging new technologies.[44] They have found that the Commission has the authority to articulate the public interest and to adopt regulations designed to achieve its asserted public interest goals.[45] Courts also have relied expressly on Commission-articulated government interests in reviewing the

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[41] According to the Conference Report accompanying h e 1992 Cable Act, the purpose of Section 614(b)(4)(B) was to ensure that digital signals would be carried "in accordance with the objectives" of the cable must carry provisions. *See* H. Conf. Rep. No. 102-862, at 67 (1992).

[42] *See In re Advanced Television Systems and Their Impact on the Existing Television Broadcast Service.* Notice of Inquiry, 2 FCC Rcd 5125 (1987).

[43] *See Turner II*, 520 U.S. 196

[44] *See Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (recognizing its own inability to anticipate and respond to the exigencies of the evolving communications landscape, "Congress sought to endow the Commission with sufficiently elastic powers such that [the Commission] could readily accommodate dynamic new developments in the field of communications") (internal quotations omitted); *Telocator Network of America v. FCC*, 691 F.2d 525, 538 (D.C. Cir 1982) ("[T]he Commission functions as a policy maker and, inevitably, a seer – roles in which it will be accorded the greatest deference by a reviewing court."); *National Broad. Co. v United States*, 319 U.S. 190, 219 (1343) (noting that Congress gave the FCC "a comprehensive mandate" to regulate broadcasting with "not niggardly but expansive powers," an appropriate response to the "new and dynamic" nature of communications technologies).

[45] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-95 (1981) (noting that the Communications Act's grant of "general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable"') (quoting *FCC v. National Citizens Committee for Broad.*, 436 U.S. 775,793 (1978)).

constitutionality of Commission actions implicating First Amendment concerns.[46] Accordingly, the Commission can and should exercise its authority to articulate digital carriage requirements.

D. The Principle of Constitutional Avoidance Does Not Apply.

The Supreme Court's reasoning in *Turner* strongly supports the conclusion that a digital must carry requirement applicable to multiplexed standard definition programming as well as high definition programming would not violate the First Amendment rights of cable operators. The NCTA itself appears to have doubts about its First Amendment argument, because it relies primarily on a principle that statutes should be interpreted, if it is fairly possible to do so, in a way that avoids serious constitutional questions.[47] The difficulty with NCTA's position is that this "avoidance principle" applies only to *serious* constitutional issues; it may not be deployed to influence statutory interpretation "simply through fear of a constitutional difficulty that, upon analysis, will evaporate."[48] Following *Turner*, NCTA's First Amendment argument is of the kind that, upon analysis, evaporates. *Turner* established, among other things, that must carry requirements are subject only to intermediate scrutiny and that the government is not required to choose the least restrictive means to achieve its important ends.

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[46] *See, e.g., WNCN* Listeners Guild, 450 U.S. at 604 (finding no First Amendment violation in Commission rules reasonably designed to promote the Commission-aniculeted policy of "relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners"); FCC *v.* National *Citizens' Committee for* Broad., 436 U.S. 775, 802 (1978) (holding that the Commission's newspaper-broadcast cross-ownership rules did not violate the First Amendment rights of those denied broadcast licenses under them because "[t]he regulations [were] a reasonable means of promoting the [Commission-articulated] public interest in diversified mass communications"). Although these broadcast cases were decided under the less searching standard of review applicable to broadcast regulation, courts analyzing Commission regulations under intermediate scrutiny also have expressed a willingness to consider interests articulated by the Commission where Congress's reliance on those interests is unclear. See *U.S. West v. FCC*, 182 F.3d 1224. 1236-37 (10th Cir. 1999) (although "not satisfied that the interest in promoting competition was a significant consideration" in Congress's enactment of the statute underlying the challenged rule. court agreed to "consider [the Commission-articulated interest in promoting competition] in concert with [Congress's explicit] interest in protecting consumer privacy" where Congress at least had not "completely ignored" interest asserted by Commission). The Supreme Court has also relied on agency-articulated government interests in applying intermediate scrutiny to state commercial speech regulations promulgated by slate agencies with policymaking authority similar to the Commission's. *See, e.g., Edenfield v. Fane, 507* U.S. 761, 764-65, 768 (1993) (looking to government interest articulated by state agency, rather than to interests expressed in agency's empowering statute. to evaluate constitutionality of agency's restriction on commercial speech by accountants), Virginia *State Bd of Pharmacy v.* Virginia Citizens Consumer Council, *Inc.*, 425 U.S. 748, 766-70 (1976) (looking to government interests articulated by state agency, rather than goals asserted by legislature, to evaluate constitutionality of state law banning price advertisement by licensed pharmacists).

[47] *See* NCTA Paper at 3; *see* generally *CFTC v.* Schor, 478 U.S. 833,841 (1986); Machinist *v. Street*, 367 U.S. 740, 749 (1961).

[48] *Almandarez-Torres v. United States*, 523 U.S. 224, 238 (1998)

Moreover, even serious constitutional issues can be avoided only when it is fairly possible to do so.[49] Limiting the digital must carry obligations of cable operators to a single programming stream would not achieve the congressional goal of preserving free, over-the-air television. For this reason as well, NCTA's "avoidance" argument must fail.

III. THE NCTA's TAKINGS ARGUMENT IS UNPERSUASIVE

The NCTA Paper argues that a digital must ***carry*** requirement extending beyond a single programming stream might constitute an unconstitutional taking of private property under the Fifth Amendment to the Constitution." NCTA's takings argument proves too much. If the argument is correct, then the current must carry rule is a taking, and a single-stream digital must carry requirement would also be a taking. The Takings Clause does not sweep this broadly. The current must carry rules do not take private property without just compensation, and neither would digital multicast must carry rules.

NCTA's takings argument rests on its contention that digital must carry rules amount to a "per se" taking of private property. That contention borders on the frivolous. It was raised earlier in this proceeding, was rebutted, and until now was effectively abandoned." Just last Term, the Supreme Court reaffirmed that "per se" takings analysis applies only to a very limited class of takings, involving a permanent physical occupations of property.[52] Cases involving permanent physical occupations of property, such as *Loretto v.* Teleprompter *Manhattan CATV Corp.*[53] and ***Bell Atlantic Corp. v. FCC***[54] are "relatively rare [and] easily identified."[55] The vast majority of takings claims – those that involve "[a]nything less than a 'complete elimination of value,' or a 'total loss"' – are subject to a much less demanding "ad hoc" analysis that applies to "regulatory takings."[56]

Required transmission of DTV signals over a cable system falls outside the narrow category of permanent, physical occupations of property recognized as per se takings by *Loretto* and other cases. The cases make clear that the actual ***physical*** invasion of the owner's property is *the* linchpin of a per se taking. In *Loretto*, the Supreme Court found that a cable company's installation on the roof of a building constituted a permanent physical invasion of the

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[49] *CFTC v. Schor.* 478 U.S. at 841

[50] *See* NCTA Paper at 12-18.

[51] ***See. e.g.***, Reply Comments of the Association for Maximum Service Television. Inc. in CS Docket No. 98-120, at 48-52 (Dec. 22, 1998); Comments of Time Warner Cable in CS Docket No. 98-120, at 28 (Oct. 13, 1998).

[52] *See* ***Tohoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency,*** 122 S. Ct. 1465, 1478 (2002).

[53] 458 U.S. 419 (1982).

[54] 24 F.3d 1441 (D.C. Cir. *1996).*

[55] *Tahoe*, 122 S. Ct. at 1479

[56] *Id.* at 1483 (quoting *Lucas v South Carolina Coastal Council, 505* U.S. 1003, 1019-20 n.8 (1992))

building owner's property.[57] Similarly, in *Bell Atlantic*, the Court found a substantial Fifth Amendment question where FCC regulations required the "physical co-location" of competitive access providers and their circuit terminating equipment in the central offices of local exchange carriers.[58] The transmission of digital broadcast signals over a cable system differs from the "physical occupation" involved in these cases.[59] Broadcasters would not be allowed to place any "fixed structure" on the physical plant of a cable operator or otherwise physically occupy private property.[60] Consequently, a digital must carry requirement would be subject to the ad hoc analysis that applies to the vast majority of takings claims.

Under the ad hoc analysis, it is clear that a digital must carry requirement would not constitute a taking. The ad hoc analysis focuses on three factors: (1) the economic impact of the regulation; (2) the extent to which it intcrfcrcs with investment-backed expectations; and (3) the character of the governmental action.[61] Each of those factors points to the conclusion that a multicast must carry requirement would not be a taking.

First, the economic impact of a must *carry* requirement on cable operators is relatively modest. As noted above, the absolute burden imposed by such a requirement would be no greater than the burden imposed by analog must carry, and the relative burden would actually decrease. Not surprisingly, the NCTA Paper stops short of asserting that a digital must carry requirement would have a significant adverse economic impact on cable operators.

Second, a digital must carry requirement would not interfere with legitimate, investment-backed expectations of cable operators. Cable systems have been subject to

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[57] *Loretto*, 458 U.S. at 438 ("Telepromptrr's cable installation on appellant's building constitutes a taking under the traditional test. The installanon involved a *direct physical attachment* ofplates, boxes. wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.") (emphasis added).

> In his Constitutional Law treatise, Professor Laurence Tribe explains:
>
> [T]he majority concedes that its analysis turns upon the fact that the CATV company, rather than the landlord. *owns* the offending installation. The Court claims that its holding does not affect the state's power to require landlords to provide such things as mailboxes, smoke alarms, and utility connections. The reason is that. although the expense in those situations is imposed directly on the landlord, and her dominion over the property is certainly impaired, she ***owns the installation.*** albeit unwittingly.

Laurence H. Tribe, American Constitutional Law 603 (2d ***ed*** 1988).

[58] *Bell Atlantic*, 24 F.3d at 1446.

[59] Indeed, the NCTA Paper acknowledges this at one pomt. See NCTA Paper at 7 ("In upholding the analog must carry rules in *Turner I* and Turner *II*, the Supreme Court did not grant broadcasters a permanent easement or other property right of 6 MHz of space on cable system.").

[60] *Loretto*, 458 U.S. at 437.

[61] *See Penn Central Transp. Co. v New York City*, 438 U.S. 104, 124 (1978).

reasonable and balanced regulation for decades, including must carry and public access rcquircmcnts. The FCC's digital must carry proceeding has been pending for years, and a digital must carry requirement has been anticipated since enactment of the 1992 Cable Act. Thus, cable operators have no basis for asserting any reasonable, investment-backed expectation in the unfettered **use** of all of their digital cahle capacity.[62]

Third, as to the character of the governmental action, a digital must carry rcquirement falls squarely within the broad category of government regulations that regularly survive constitutional review under the ad hoc analysis. A digital must cany requirement would serve important government interests, while leaving cable operators **free** to use all but a narrow slice of their cable capacity for programming of their choosing.[63]

In sum, a digital must cany requirement would not take private property without just compensation. **As** with NCTA's First Amendment argument, there is simply no **serious** constitutional issue here, and thus the avoidance principle does not come into play. For the **same** reason, there is no occasion to consider the NCTA's additional argument that the Commission lacks authority to authorize a taking.

* * * *

For the reasons stated above, Public Television urges the Commission to interpret the phrase "primary video" to include multiplexed video programming. Such **an** interpretation is in accordance with the Constitution, the Supreme Court's ***Turner*** opinions, the statutory language, and the underlying goal of preserving free, over-the-air television. Accordingly, the Commission should require mandatory carriage by cable operators of all of the digital broadcast programming that viewers can receive over the air.

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[62] The NCTA Paper reports that cable operators have invested more than $60 billion to upgrade **their** system to be able to provide digital signals. The relevant issue is not whether cable operators have made a substantial investment, but whether they had reasonable invesment-backed expectations that they would be free of regulation. Moreover, cable operators typically receive from governmental bodies valuable rights to string cables along public rights of way and also enjoy what amounts to government-conferred monopoly status. The fact that cable operators receive significant benefits from the government, including significant benefits derived from pervasive governmental regulation of the cable industry, further undercuts their argument **that** a particular regulation takes their private property.

[63] The Supreme Court has warned against defining the universe ofrelevant property interests too narrowly when analyzing takings claim. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central*, 438 U.S. at 130-31. Consequently, the NCTA Paper's suggestion **that** a digital must carry requirement should be viewed in isolation, rather than in the context ofthe cahle operator's total capacity, is incorrect.

Respectfully submitted,

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Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Ms. Susan M. **Eid**
Ms. Stacy Robinson
Ms. Alexis Johns
Ms. Catherine C. Bohigian
Mr. W. Kenneth Ferree
Mr. Rick Chessen
Ms. Jane Mago

EXHIBIT B

EXHIBIT B-1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	*CS* Docket No. 98-120
	)	
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
	)	

To: The Commission

AFFIDAVIT OF JOHN M. LAWSON

1. My name is John Lawson. I am President and CEO of the Association of Public Television Stations (APTS). APTS is a nonprofit organization whose members comprise nearly all of the nation's 357 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, as well as engaging in planning and research activities on behalf of its members

2. In my current position, I have had numerous conversations with public television station executives, and have carefully considered a number of industry studies, regarding the state of the media industry generally and the health and financing of public stations in particular. I have also been deeply involved with the digital transition of public television stations since at least 1993. This has given me a unique opportunity to observe first-hand the challenges facing public broadcasting and to reach conclusions about the changes and strategies that may be necessary to preserve a future for public television.

3. The economic situation for public broadcasters is poor. In addition to the downward trends in advertising revenues for broadcasting in general, which affects the ability of public television stations to raise funds from corporate sources, public television is suffering from other financial stresses. A number of revenue sources that support public broadcasting have either declined or stagnated so that they have not kept up with inflation. For instance, since 1990, new member revenue has declined by $17 million in real terms. Pledge drives are experiencing rising costs and decreasing member yield. Foundation support for public television stations has also declined. While until recently underwriting had experienced growth moderately above the rate of inflation, major corporate underwriters are now re-evaluating their philanthropy and in some instances (most notably in the case of Exxon/Mobil's sponsorship of *Masterpiece Theater*) cutting back on their support. And while state and federal support has grown slowly over the long-term, the current fiscal crisis among the states has resulted in precipitous declines in state funding with few prospects for even short-term recovery. The modest increases in real dollars in federal funding over the past few years cannot offset the loss of revenue from other sources.

4. In my capacity as APTS President and CEO, I have had the opportunity to speak with a number of station General Managers, who confirm that numerous public television stations are now faced with budget deficits and have had to reduce their workforce and curtail community services. The fact is that public television's core service — broadcast television — seriously threatcned.

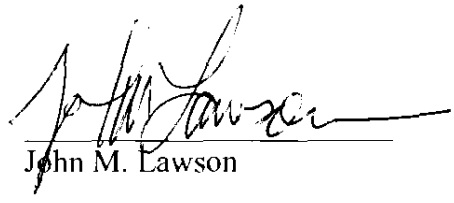
5. The vast majority of our stations and their partners — universities, state governments and underwriters, including loyal members and charitable foundations — are

convinced that public television's future viability depends upon its being able to provide a rich mix of high detinition television ("HDTV") and multicast and datacast services. Virtually all of our stations have determined that providing a range of diverse noncommercial educational services during the day to serve multiple targeted audience groups is the best and highest use of their digital channels. In addition to fulfilling our mission, deploying a multicast strategy will enable our stations to be viable and competitive programmers in our current marketplace of niche program services for targeted audiences.

6. Cable carriage of our multicast services, along with our HDTV service, is essential to the viability of these services. Without the assurance that our multicast services will reach the 70% of the viewers who, on average, subscribe to cable, public television stations will be unable to generate underwriting revenue and forge the types of partnerships they need to create and sustain these new, value-added digital program streams. Without multicast carriage, public television will be unable to compete in an increasingly competitive multichannel world. The consensus within the public television station community is that a single-channel service model will seriously disadvantage public stations in the future. The choice to multicast, for most public television stations, reflects the judgment that survival as a digital broadcaster requires programming for niche audiences.

7. Compounding the urgency of this issue is the enormous capital that stations have raised to meet the digital conversion deadline: nearly $1 billion *through* February 2003. Without full multicast camage and the viable service models that multicast enables, the digital facilities our stations have built in good faith implementation of

the DTV mandate will he nothing more than costly '*whiteelephants." I do not think it is too strong to say that without a viable multicast strategy, which includes nationwide cable carriage, the increased overhead cost structure of our stations' digital facilities will destroy the financial viability of noncommercial television in the United States.



John M. Lawson

3-13-03

[date]

EXHIBIT B-2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Television Broadcast Signals	)	
	)	
	)	
Amendments to Part 76 of the Commission's Rules	)	CS Docket No. 98-120
	)	
	)	

To: The Commission

DECLARATION OF LANCE OZIER ON BEHALF OF THE PUBLIC BROADCASTING SERVICE AND THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

1. My name is Lance Ozier. As set forth more specifically below. I have worked lor public television stations, and in public television morc broadly, for nearly thirty years. and I have extensive experience in the area of national public television program underwriting.

2. Since 1990, I have been employed by WGBH Educational Foundation, licensee ofthe major public television station WGBH located in Boston, Massachusetts. WGBH is a major producer of local and national public television programs, including NOVA. FRONTLINE, AMERICAN EXPERIENCE: ARTHUR and other programs that arc distributed on a national basis by the Public Broadcasting Service ("PBS"). From 1998 through the present, I have been employed by WGBH as Vice President. National Program Markcting and Board Affairs. My principal responsibility in that position involves overseeing WGBH's national corporate and foundation fundraising operations. including all forms of program underwriting. From 1990 until 1992, I was employed by WGBH as Director of National Underwriting. In that position, I was responsible for raising funds for national television and radio programs and projects from national corporatc and foundation sources.

3. Prior io joining WGBH, I was employed by PBS for twelve years. I initially joined PBS in 1978. and from 1983 until I990 acted as PBS's Vice President for Program Business Affairs. My responsibilities in that position centered upon administration of PBS's corporate program underwriting policies and PBS's contracting for program production and acquisition. I first began my public television career in 1973 working for the University of North Carolina Television Network, a state network of public television stations. and I worked from 1977-78 as Business Manager for WGBY, a